SUPREME COURT, U. S.

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No. 618

In the Supreme Court of the United States

OCTOBER TERM, 1967

FORTNIGHTLY CORPORATION, PETITIONER

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Certiorari was granted in this case on December 4, 1967, and the Court invited the Solicitor General to file a brief expressing the views of the United States. Before responding on the merits, however, we deem it appropriate to bring to the Court's attention circumstances which may argue against present review of the difficult issues involved.

Unquestionably, the case presents an important question under the copyright laws which has great practical significance for the CATV industry, the broadcasters and the copyright owners. Its resolution, moreover, directly concerns several government agencies, the Copyright Office, the Antitrust Division of the Department of Justice, and the Federal Com-

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munications Commission. Fully tried on an ample record and carefully reviewed on appeal, the case accordingly seems ripe for adjudication in this Court. Yet, we suggest that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution.

In our view, it is most unlikely that judicial proceedings under present law can achieve a workable and permanent solution to the overall problem of copyright liability for CATV operations that is consistent with the public interest. One evident difficulty is that courts are not wholly free to weigh and accommodate conflicting policy considerations; bound to apply existing law, they cannot make adjustments with the same freedom as the legislative branch. Yet all the governmental agencies with responsibilities in the area—whatever their different points of view—are agreed that a simple "yes" or "no" answer to the legal question presented here would not satisfactorily resolve the underlying problems as a matter of policy. Indeed, holding CATV systems liable for all copyright infringements might have a substantial adverse effect on the viability and continued growth of CATV as a valuable adjunct of live broadcasting. And, on the other hand, holding CATV systems immune from copyright liability in all cases probably would provide CATV with an unfair advantage over certain competitors (such as new UHF stations) and might unduly deter the creative incentive which copyright protection is designed to foster.

To be sure, there may be less radical alternatives open to the courts in this matter. But, judicial limitations foreclose at least some of the options available to the legislative branch. And, of course, the nature of the judicial process, requiring the adjudication of a particular case on its own peculiar facts, does not permit a comprehensive resolution of this complex matter in all its many aspects, with appropriate use of such regulatory techniques as compulsory licensing, a varied schedule of royalties, or the establishment of a royalty payment scheme.

We do not, however, suggest that the Court defer to congressional action only because that forum is more suited to making the necessary policy accommodations and enjoys more latitude in fashioning a creative solution. Very relevant is the fact that the Congress is presently undertaking the task and that strong indications point toward a satisfactory legislative resolution of the problem in the near future. Indeed, several measures were introduced in the 89th Congress [1] and promising proposals are now pending.[2] Moreover, before the Court granted certiorari in this case, the private interests involved had gone some distance in compromising their differences and the con-

[1] See Resp. Br. in Opp., pp. 28–29.

[2] In the 90th Congress, H.R. 2512 was passed by the House on April 11, 1967; it had contained a CATV copyright liability provision which was deleted prior to its enactment to permit further consideration of some aspects of the matter. See 113 Cong. Rec. 43644–43647 (April 6, 1967); *id.* at 43857 (April 11, 1967). S. 597 is presently pending in the Senate Judiciary Committee, and contains a similar provision. Senate passage of a general copyright law revision bill without such a provision seems quite unlikely.

cerned government agencies have worked hard toward agreement on a legislative solution. Those efforts will probably be arrested, however, by the pendency of the case here. Although it is anticipated that the matter must ultimately be resolved by legislation, neither side is likely to be willing to forego the significant advantage a favorable ruling by this Court would confer in the eventual compromise negotiations. Thus, in our view, decision here would not be finally determinative of the overall controversy, but would serve only to upset the existing balance, delaying and perhaps, impeding, congressional resolution of the problem.[3]

We recognize, of course, that the Court cannot follow a uniform practice of deferring its own action in cases properly brought before it merely because it is possible, or even probable, that any decision rendered will be modified by subsequent legislation. Yet there are rare instances where that course is appropriate in light of the imminence and special advantages of a legislative resolution of the underlying issue. We submit this is such an occasion. Indeed, here, if our appraisal is correct, the judgment of the courts, whoever prevails, will not rule the present parties or any others for the future, and their jurisdiction is invoked primarily to secure an advisory opinion to lay before another forum. In our view, the courts may properly decline to be so used.

These considerations persuaded the Solicitor General not to urge the grant of certiorari when the petition

[3] And, since a CATV copyright liability provision is tied to a general revision of the copyright laws, that revision will undoubtedly be delayed as well.

was pending, despite the obvious importance of the case and the government's interest in the question. The Court having acted and invited the views of the United States, we believe our responsibility to represent the public interest and our duty of candor toward the Court require us promptly to disclose our view that the Court should not now undertake to decide the question presented because further proceedings here will be likely to serve no purpose other than to retard and embarrass a desirable legislative resolution of the issue. Of course, should dispositive legislation not eventuate, the Court will be free to re-assess the appropriateness of an adjudication.

Accordingly, we suggest that the Court revoke that portion of its order granting certiorari which sets the instant case for argument following Nos. 363 and 428[4] and hold the case on its docket for a reasonable time pending legislative developments during the Second Session of the 90th Congress.[5]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[4] We note that those cases—involving the jurisdiction of the Federal Communications Commission over CATV operations—present discrete issues that can be resolved without reference to the copyright question.

[5] If the Court believes our suggestion has merit, it would of course be appropriate to notify the parties promptly, before they are required to print the record and prepare briefs on the merits. To facilitate prompt consideration, we are filing and serving this paper in typewritten form.

* U.S. GOVERNMENT PRINTING OFFICE: 1967